

**3.H.1.f. Message Traffic**

(1) Message traffic originated by the military judge shall include the phrase “JUDGE [*last name*] SENDS”.

(2) Message traffic addressed to the military judge shall include the phrase, “FOR JUDGE [*last name*]”.

**3.H.2. Detailing Certified Defense Counsel to Special and General Courts-Martial**

**3.H.2.a. General**

The cognizant MLC will detail Article 27(b), UCMJ certified defense counsel in accordance with their established procedures. At the time the charges are preferred, the servicing legal office should contact the cognizant MLC to arrange for detail of defense counsel. The process for obtaining detailed defense counsel will not be delayed because doing so may delay the court-martial unnecessarily. Detailed defense counsel may be a Coast Guard law specialist or a military attorney from any other DoD military service pursuant to an inter-service agreement [*see*, enclosure (24b)]. Defense counsel should not normally be detailed from the staff of the convening authority or of the OEGCMJ. Defense counsel should not normally be within the rating chain of the cognizant SJA. Any demand for detailed counsel who is not on the convening authority’s or OEGCMJ’s staff or in the rating chain of the SJA should be forwarded immediately to the convening authority for action. The accused is not entitled to be represented by more than one military attorney [*see*, RCM 506(a)]. Normally, the cognizant MLC will fund travel for any military counsel provided at government expense to the accused.

**3.H.2.b. Restriction**

The detailing authorities shall ensure that neither the SJA detailing trial counsel nor the trial counsel are in the rating chain of the detailed defense counsel.

**3.H.2.c. Excuse or Withdrawal of Detailed Defense Counsel**

A detailed defense counsel may be excused only with the express consent of the accused, or by a military judge upon application for withdrawal by the detailed defense counsel for good cause shown. [*See*, RCM 506(c).]

**3.H.3. Obtaining Individual Military Counsel [IMC]**

**3.H.3.a. General**

Article 38, UCMJ provides that an accused has a right to be represented before a general or special court-martial or at an investigation under Article 32, UCMJ, by military counsel of his own selection if that counsel is reasonably available. Counsel serving in the Coast Guard or Department of the Navy are “reasonably available” to represent a Coast

Guard accused unless they are unavailable within the meaning of RCM 506, this paragraph or under regulations of the Secretary of the Navy [*see*, JAGMAN Section 0131].

**3.H.3.b. Categorical Determinations of Non-Availability**

**(1) Persons Deemed “Not Reasonably Available”**

Under the authority of RCM 506(b)(1) the following Coast Guard personnel, in addition to those listed in RCM 506(b)(1) are, by regulation, deemed “not reasonably available” because of the nature of their assignments:

- (a) Persons on terminal leave or not on active duty;
- (b) Persons assigned to an out-of-specialty or non-legal billet;
- (c) Persons assigned as a full-time military judge or active as a part-time military judge;
- (d) Persons assigned to Coast Guard appellate advocacy duties (either government or defense) and their supervisors;
- (e) Persons assigned to an organization, activity, or agency other than any of the armed forces of the United States; and,
- (f) Persons assigned to duty at the departmental level or higher.

**(2) Exception**

**(a) Existing Attorney-Client Relationship**

If an attorney in one of the categories in subparagraph 3.H.3.b(1) above has an existing attorney-client relationship with the accused regarding a charged offense, the attorney’s availability must be determined under the procedures in subparagraph 3.H.3.c below. [*see*, RCM 506(b)(2)].

**(b) Defined**

An attorney-client relationship exists between the accused and requested counsel when it has been properly authorized by the responsible authority, the requested counsel and the accused have had a privileged conversation relating to a charge pending before a proceeding (*e.g.*, GCM, SPCM, Article 32 investigation), and the requested counsel has engaged in active pretrial preparation and strategy with regard to that charge. A counsel will be deemed to have engaged in active pretrial preparation and strategy if that counsel has taken action on the case that materially limits the range of options available to the accused at said proceeding. Examples of active pretrial preparation include, but are not limited to: advising the accused to waive or assert a legal right, other than simply asserting the right to remain silent, where the accused followed such advice by waiving or asserting that right; representing the accused at an Article 32 investigation dealing with the same subject matter as any charge pending before the proceeding; submitting evidence for testing or analysis; offering a pretrial agreement on behalf of the accused;

submitting a request for an administrative discharge in lieu of trial on behalf of the accused; or interviewing witnesses relative to any charge pending before the proceeding.

**(c) Relationships That Do Not Qualify for Exception to Categorical Determination of “Not Reasonably Available”**

If the attorney-client relationship were created solely to provide advice to a member pursuant to paragraph 1.C.2., (*U.S. v. Booker*), solely for representation of the accused at a pretrial confinement IRO hearing pursuant to RCM 305(f), or to represent the accused as an appellate counsel pursuant to Article 70, UCMJ [*see*, paragraph 5.C.5 below], this exception does not apply. Contact with a prospective IMC to discuss the IMC’s availability does not create an “existing” attorney-client relationship and the exception does not apply. Simply discussing the legal and factual issues in the case with the accused, or conducting legal research concerning an issue in the case does not constitute active pretrial preparation and strategy and the exception does not apply.

**3.H.3.c. Submitting Individual Military Counsel [IMC] Requests**

Requests for IMC shall be submitted to the convening authority via the trial counsel and the convening authority’s SJA. The request shall include any matters to be considered in favor of providing the requested counsel. If the accused has an existing attorney-client relationship with the requested attorney regarding a charged offense, the request shall include the general circumstances and authority under which the relationship was established, the approximate dates of the relationship, and the specific charged offenses that were the subject of the relationship, without revealing privileged information. If the requested attorney is one of those “not reasonably available” under subparagraph 3.H.3.b(1) above because of the nature of that attorney’s current assignment, the request shall state whether the attorney is expected to be available at the time of the proceedings, and the reasons therefor.

**3.H.3.d. Action on Requests for Attorneys Categorically Deemed “Not Reasonably Available”**

If an accused before a general or special court-martial requests an IMC who is deemed “not reasonably available” under subparagraph 3.H.3.b(1) above and the request does not assert an exception under subparagraph 3.H.3.b(2) above the convening authority shall deny the request and state the reasons therefor, citing this section and RCM 506(b)(1).

**3.H.3.e. Action on Other Cases**

In other cases, if an accused before a general or special court-martial requests an IMC, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. For attorneys assigned to duty with another armed service, the procedures of that service shall be used. For attorneys assigned to Coast Guard commands:

(1) The request shall be forwarded to the SJA for the requested IMC’s commanding officer (*i.e.*, IMC’s SJA). The request should be forwarded by message, fax,

overnight mail, or similarly expeditious means, with copies to the cognizant MLC [*see*, paragraph 3.H.2 above] (the “detailing authority”), the military judge (if detailed), and other appropriate commands. The IMC’s SJA shall determine whether the requested IMC is reasonably available, using the criteria in subparagraph 3.H.3.f below.

(2) If the IMC’s SJA concludes that the requested IMC is not reasonably available, he or she shall forward the request to the attorney’s commanding officer who shall determine the matter. To provide a basis for review, all determinations that a requested IMC is not reasonably available shall be in writing, shall contain the reasons therefor, and shall be provided to the accused or counsel via the convening authority.

(3) When counsel is determined to be available, the IMC’s SJA shall notify the detailing authority, who shall detail the counsel, and may excuse previously detailed counsel, in accordance with RCM 506(b)(3).

**3.H.3.f. Factors for Determining Availability**

In determining the availability of counsel to serve as IMC, all relevant factors may be considered, including, but not limited to, the following:

(1) The existence of an attorney-client relationship between the accused and the requested IMC regarding a charged offense. If the attorney was detailed as counsel to the accused, *see* RCM 505(d)(2)(B).

(2) Any disqualifying factors relating to the requested IMC’s duty assignment; any previous involvement with the case as an investigating officer or a witness; or assignment to the same rating chain of the trial counsel or cognizant SJA (rating chain disqualification’s ordinarily may be remedied with an express knowing waiver by the accused) [*see*, subparagraph 3.H.2.b above].

(3) The requested IMC’s duty, position, responsibilities, and workload.

(4) Any ethical considerations that might prohibit or limit the participation of the requested IMC.

(5) Time and distance factors (*e.g.*, travel to and from the sites, anticipated date, length of the trial or hearing, the nature and complexity of the charges and legal issues involved in the case, associated costs and availability of funding). Availability of funding may be determined by consultation with the detailing authority, or arrangements may be made for funding from other sources.

(6) The effect of requested IMC’s absence on the proper representation of the requested IMC’s other clients.

(7) Overall impact of the requested IMC's absence on the ability of the requested IMC's office to perform its required mission (*e.g.*, personnel strength, scheduled departures or leaves, and unit training and mission requirements).

(8) The detailing authorities shall ensure that neither the SJA detailing trial counsel nor the trial counsel are in the rating chain of the IMC. The accused may waive this protection.

**3.H.3.g. Review of Determinations that Requested IMC is Not Reasonably Available**

(1) When a request for IMC is denied in accordance with subparagraph 3.H.3.d above an accused has no right to review of this decision except by motion before a court-martial.

(2) Where a determination that an IMC assigned to duty with another service is not reasonably available is based on that service's determination of unavailability, any appeal must be submitted in accordance with that service's regulations.

(3) In other cases, an accused may, upon timely request, obtain review for abuse of discretion of a determination of unavailability by the OEGCMJ over the command making such determination. If the OEGCMJ or higher authority made the determination, review shall be by the next higher authority in the chain of command. An accused is not entitled to such review if the reviewing authority under this subparagraph is Commandant (G-C).

(4) Any request for review of a determination of unavailability must be submitted promptly. In the absence of circumstances justifying a longer delay, review may be denied as untimely if the request is submitted more than (3) working days after the accused's receipt of the adverse determination.

(5) Requests for review of determination that requested IMC is not reasonably available shall be made by message or letter to the appropriate authority, with copies to the other involved commands. The request for review shall contain a copy of the determination and articulate why such determination was an abuse of discretion.

**3.H.3.h. Excuse or Withdrawal of IMC**

Like detailed defense counsel, an approved IMC may be excused only with the express consent of the accused, or by a military judge upon application for withdrawal by the IMC for good cause shown. [*See*, RCM 506(c).]